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Supreme Court of the United States

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October Term, 1971

No. 71-630

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
AND
HONORABLE JESSE W. CURTIS,
Petitioner,

vs.

COURT OF APPEALS FOR THE NINTH CIRCUIT,
Respondent,

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
Real Parties in Interest,

No. 71-631

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
AND
HONORABLE JESSE W. CURTIS,
Petitioner,

vs.

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
Respondents.

REPLY IN SUPPORT OF PETITIONS.

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SUBJECT INDEX

Page

I.

The Petition for a Writ of Certiorari Is Timely 2

II.

Issuance of Mandamus Is Discretionary Only After a Determination That It Is Otherwise Proper 4

Conclusion 5

TABLE OF AUTHORITIES CITED

Cases

Bowman v. Loperena, 311 U.S. 262 (1940) 3

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 4

Roche v. Evaporated Milk Association, 319 U.S. 21 (1943) 4

Textbook

Stern and Gressman, Supreme Court Practice (4th Ed. 1969), pp. 248-249 3

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REPLY IN SUPPORT OF PETITIONS.

By the petitions herein, petitioner seeks to correct a judicial usurpation of power in the use of mandamus to compel petitioner to exercise his discretion in favor of *pro hac vice* admission of Michael E. Tigar to the District Court bar. This compelling ground for granting the relief sought is almost totally ignored in the opposition of respondents and real parties in interest Munoz and Tigar ("respondents" herein).

I.

The Petition for a Writ of Certiorari Is Timely.

In the petitions, petitioner pointed out that the petition for a writ of certiorari was timely because filed within 90 days of the Court of Appeals' order of August 9, 1971, denying petitioner's May 5, 1971 Petition for Rehearing of the Court of Appeals' order of April 21, 1971. (Petitions 4-6). Respondents urge, however, that petitioner's complaint is with the Court of Appeals' order of March 17, 1971, that petitioner's May 5, 1971 Petition for Rehearing was untimely as to that order, and that the time for filing a petition for a writ of certiorari ran from March 17, 1971, because only a timely petition for rehearing suspends the running of time. (Op. Br. 2-3). Respondents' argument is in error.

First, petitioner does not here seek review of the Court of Appeals' order of March 17, 1971. That order, while indicating the "desirable" construction of the local rule with respect to Tigar's application for *pro hac vice* admission, denied respondents' petition for a writ of mandamus. Petitioner was not aggrieved by that action. The Court of Appeals' order of April 21, 1971, on respondents' petition for rehearing and, in the alternative, motion for enforcement of the order of March 17, summarily directed Tigar's *pro hac vice* admission, disregarding petitioner's discretionary power over such admission.

Second, even if the March 17, 1971 order were to be considered as commencing the time for filing a

petition for certiorari, respondents' own petition for rehearing was pending until April 21, 1971, thereby suspending the running of time.

Finally, even if petitioner's Petition for Rehearing were untimely, the Court of Appeals considered it on the merits and the time for filing a petition for a writ of certiorari runs from the date rehearing was denied. As held in *Bowman v. Loperena,* 311 U.S. 262, 266 (1940):

> ". . . The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. *But where the court allows the the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."* (Emphasis added)

Here, although construing petitioner's Petition for Rehearing as a petition to recall the mandate and a suggestion of rehearing in banc, the Court of Appeals expressly stated that the petition had been considered on the merits. Hence, the time for filing a petition for certiorari commenced to run on August 9, 1971. See Stern and Gressman, Supreme Court Practice (4th Ed. 1969) pp. 248-249.

II.

Issuance of Mandamus Is Discretionary Only After a Determination That It Is Otherwise Proper.

The opposition seizes upon the oft repeated proposition that:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court."
>
> *Roche v. Evaporated Milk Association,* 319 U.S. 21, 25 (1943).

From this, it is argued that the Court of Appeals' issuance of mandamus involved "questions not of power but of prudence" (Opp. Br. 4), which are not reviewable in this Court.

Roche itself belies this conclusion. In reversing the issuance of mandamus, this Court held that ". . . in the circumstances of this case there are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ." 319 U.S. at 25.

La Buy v. Howes Leather Co., 352 U.S. 249 (1957), also cited in the brief in opposition, is not to the contrary. There this Court affirmed the issuance of mandamus by the Court of Appeals because it "was justified in finding the orders of reference were an abuse of petitioner's power. . . ." 352 U.S. at 256. This Court carefully reviewed the record and concluded:

> "The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." 352 U.S. at 260.

Here, none of the threshold requisites for invoking the discretionary power of the Court of Appeals were satisfied.

Conclusion.

The petitions herein raise an important question of the usurpation by the Court of Appeals of discretionary power which belongs to the District Court alone. That usurpation of power can and ought to be corrected by this Court.

Respectfully submitted,

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